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Supreme Court, U.S.
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No. _____

IN THE

Supreme Court of the United States

October Term, 1997

FRANK D. NEWTON
and
MARILYN NEWTON

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari
To The United States Court of Appeals
For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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35 pp

QUESTIONS PRESENTED

1. Whether the Court of Appeals' decision that the United States could extinguish a statutory waiver of sovereign immunity by its unilateral action of selling the personal property involved in a quiet title case was error as a matter of law because jurisdiction is determined at the time the quiet title complaint is filed and no act of the United States can oust or moot that jurisdiction.

2. Whether the Court of Appeals' decision that all quiet title actions relating to personal property can be mooted by the sale of the property since lis pendens cannot be filed for personal property was error as a matter of law because a judgment in favor of the newtons is still enforceable against subsequent purchasers under a constructive notice theory available under both federal and state law.

LIST OF PARTIES

All parties appear in the caption of the case on the cover page.

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OPINIONS BELOW

The opinion of the Court of Appeals issued in support of its judgment is unpublished but reported as *Frank D. Newton; Marilyn Newton v. United States*, 1997 U.S. App. LEXIS 33518, and is reprinted in Appendix A.

The opinion of the District Court is unpublished but reported as *Frank D. Newton and Marilyn Newton v. United States*, 1997 U.S. Dist. LEXIS 5275; 79 A.F.T.R.2d (P-H) 2333, and is reprinted in Appendix B.

The order of the Court of Appeals denying rehearing and rejecting the suggestion of rehearing en banc is unpublished, and is reprinted in Appendix C.

JURISDICTION

The order of the Court of Appeals in this case denying the petition for rehearing was filed on March 16, 1998. This petition is therefore timely under this Court's Rule 13.3.

This Court has jurisdiction to review the judgment of the Court of Appeals pursuant to 28 U.S.C. Section 1254(1).

STATUTORY PROVISION INVOLVED

This case involves application of the following statute.

> Under the conditions prescribed in this section and section 1444 of this title for the protection of the United States, the United States may be named a party in any civil action or suit in any district court, or in a State court having jurisdiction of the subject matter—
>
> (1) to quiet title to, . . .
>
> real or personal property on which the United States has or claims a mortgage or lien.

28 U.S.C. § 2410(a).

STATEMENT OF THE CASE

On July 23, 1996, the IRS seized certain personal property of the Newtons (Quota Share (QS) Certificates described as 76268 units, designated as 3A-C-B 967905881). On August 13, 1996, the Newtons filed an action to quiet title to the property in the United States District Court for the District of Alaska. The Newtons alleged that United States claimed an interest in and to the property by virtue of its filing in the Kenai Recording Office notices of federal tax liens for federal income taxes of the Newtons and the seizure. The Newtons also alleged in their Complaint that the United States erroneously and illegally seized and intended to sell the property in violation of 26 U.S.C. 6335 and 26 C.F.R. 301.6335-1, and other IR Code provisions since it has failed, among other violations, to: (1) serve a Notice of Seizure on the Newtons

in strict compliance with the provisions of 26 U.S.C. Section 6335(a); and (2) serve a Notice of Sale on the Newtons in strict compliance with the provisions of 26 U.S.C. Section 6335(b).

On August 15, 1996, the IRS sold the property.

On October 8, 1996, the District Court issued an Order requiring the Newtons to produce proof of service on United States within twenty (20) days. The record shows summonses were issued as to the United States Attorney and the United States Attorney General on October 25, 1996,[1] and return of service executed and proof of mailing filed the same date. The United States filed its Answer to the Complaint on December 30, 1996.

The United States filed a motion for summary judgment on January 17, 1997, asserting that even though the Complaint was filed before the tax sale, under the facts of the case at bar, the District Court should find that the waiver of sovereign immunity pursuant to 28 U.S.C. Section 2410 does not apply. The United States argued that the waiver of sovereign immunity should be determined as of October 23, 1996, when the United States was first notified of the pendency of the lawsuit. "The IRS employees conducting the sale were unaware of the challenge at the time the sale was conducted and did not

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[1] Well within the 120 day limit allowed by Rule 4, Federal Rules of Civil Procedure.

act to 'oust' the Court of jurisdiction." In short, the United States argued that the Newtons did not attempt to notify the IRS agent conducting the sale that they had filed an action to quiet title.

The Newtons responded in opposition thereto on January 22, 1997. They disclosed that they had in fact notified the IRS agent conducting the sale and others of the suit. In fact, the Newtons sent a copy of the Complaint itself by certified mail to the IRS. In any event, the Newtons argued that United States had a lien interest in the subject property when they filed their action to quiet title, which is all that is required under § 2410.

The United States filed its reply to the Newtons' opposition on February 4, 1997. The United States changed its argument in its reply brief and argued that the Newtons should have given the IRS oral notice that they had filed suit.

When the Newtons became aware that Kevin M. McDougall was the purchaser at the tax sale, they filed their motion for leave to add a party defendant. The United States filed its non-opposition to their motion to add an indispensable party.

The District Court granted judgment in favor of the United States by Order of March 28, 1997, by finding it lacked jurisdiction of the subject matter. (App. B). The district court noted that "[t]he United States moved for summary judgment, arguing that the waiver of sovereign

immunity in Section 2410 lapses when the property in question is sold to a third party." (App. B-2). The District Court misconstrued the Newtons arguments by finding that they "rel[ied] upon cases which hold that if the taxpayer files a lis pendens prior to the sale and under state law such a notice prevents a purchaser at the sale from being a bona fide purchaser for value, then the subsequent sale will not moot the taxpayer's proceeding." (*Id.*). This was not the argument advanced by the Newtons.

The District Court held that "[n]o lis pendens was filed or could have been filed in this case because the property in question is personal property and not realty. Therefore, the cases upon which the Newton's rely are inapposite. See Hughes v. United States, 953 F.2d 531, 537-39 (9th Cir. 1992). This Court's jurisdiction in an action against the United States depends upon a valid waiver of sovereign immunity. [Cite omitted]. The United States has not waived its sovereign immunity in an action such as this." (*Id.*). The District Court then denied the Newtons' motion to add a party as moot. (*Id.*). Judgment was entered on April 7, 1997.

The Newtons timely appealed to the Court of Appeals. On appeal, the Newton's argued, as is relevant here, that a waiver of sovereign immunity is to be determined at the time the suit is filed, that no basis exists that would allow the government to "oust" the court of its jurisdiction, and that this is the unanimous ruling of the Ninth Circuit and every other court to consider the matter.

On November 17, 1997, the Court of Appeals affirmed the district court[2] holding that the appeal was "moot because the Newtons' inability to file a lis pendens against their personal property makes any judgment in their favor unenforceable against subsequent purchasers." (App. A-4).

The Newtons timely filed a petition for rehearing with a suggestion for rehearing ***en banc***. On March 16, 1998, the Court of Appeals denied the motion for rehearing and rejected the suggestion for rehearing ***en banc***. (App. C).

REASONS FOR GRANTING THE WRIT

This case presents a simple question of the application of a statutory waiver of sovereign immunity. 28 U.S.C. § 2410 waives sovereign immunity, *inter alia*, to name the United States as a party to a suit to quiet title to personal property on which the United States claims a lien.

The Newtons' filed suit naming the United States as a party after the United States had seized their personal property and while the United States was asserting a federal tax lien on the property. The Newtons immediately served the IRS agents involved in the seizure by certified mail and served the U.S. Attorney and Attorney General with the time allowed under Rule 4, Federal Rules of Civil

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[2] After noting, but not deciding, the question of whether a genuine issue of material fact existed as to notice.

Procedure. Two days after the initiation of the suit, the United States sold the property. The District court granted summary judgment to the United States on the ground that when the property was sold the waiver of sovereign immunity lapsed.

The Court of Appeals held that the waiver of sovereign immunity is extinguished by the sale of the property unless notice of the suit is given prior to the sale. The Court did not address whether a genuine issue of material fact existed as to notice, however, holding that the case was moot because any judgment would be unenforceable against subsequent purchasers.

This ruling is erroneous on three independent bases. First, waiver of sovereign immunity is to be determined when the suit is filed under the plain language of the statute, and factors such as notice and sale are immaterial to the inquiry. Second, any unlawful sale to a subsequent purchaser is void ***ab initio*** under federal and Alaska law and confers no rights to the purchaser. Having no rights in the property, a judgment is enforceable against him. Third, sufficient constructive notice is given to purchasers at tax sales by both the Internal Revenue Code and Alaska law to allow enforcement of the judgment against the subsequent purchaser.

Under the clear language of § 2410 and applicable federal court decisions, the district court had jurisdiction to hear the case, and no subsequent conduct by the United States divested the court of that jurisdiction. Further, any

judgment entered by the district court is enforceable against subsequent purchasers under applicable federal and state law.

Because this Court has not addressed these specific questions, the Court should issue a writ of certiorari to decide the conflict between the Court of Appeals' decisions and the general principles expressed in other decisions of the Ninth Circuit, those of other circuits, and the district court decisions on point.

The method by which the United States may divest an individual of the procedures enacted for his benefit in protecting his property rights presents an important federal question that should be resolved by this Court.

ARGUMENT

I. The Court of Appeals Erred as a Matter of Law Because Jurisdiction Is Determined at the Time the Quiet Title Complaint Is Filed and No Act of the United States Can Oust or Moot That Jurisdiction.

The thrust of the Court of Appeals' decision is that after a district court has obtained jurisdiction to determine the validity of the seizure of personal property, the United States can divest the court of its authority by simply selling the property. This is contrary to the law of the Ninth Circuit. *E.g. Goodwin v. United States*, 935 F.2d 1061, 1064 (9th Cir. 1981) ("We find 'nothing in § 2410(a)(1) that permits the government to oust the court of

jurisdiction validly invoked."). It is contrary to the law of other circuits. *E.g. Kulawy v. United States*, 917 F.2d 729, 733 (2nd Cir. 1990) (same; and "if a suit under § 2410(a)(1) were not available, 'the taxpayer would have no available means of enforcing compliance with the procedures enacted for his benefit.'"). It is contrary to general principles of when a case is moot. *See, e.g. Fultz v. Rose*, 833 F.2d 1380, 1380 (9th Cir. 1987) ("An appeal must be dismissed as moot when intervening events that do not involve wrongful conduct by the appellee leave the appellate court unable to grant effective relief.").

The decision also overlooks the rule of law that a judgment would be enforceable against the purchaser because the sale was void ***ab initio***; therefore, good faith of the purchaser is irrelevant. *Monet v. Henderson*, 1995 U.S. Dist. LEXIS 12862, at *8, 76 A.F.T.R.2d 6424 (D. Haw. Aug. 21, 1995); *Martin v. Rubel Enterprises*, No. CV 92-3184 DT (Tx), Findings of Facts and Conclusions of Law at 4 (C.D. Cal. Dec. 30, 1994); *Rosenburg v. Smidt*, 727 P.2d 778, 783 (Alaska 1986).

A. Notice to United States

Preliminary to its holding, the panel stated that the United States' sale of the property after the filing of the suit "does not extinguish its waiver of sovereign immunity if the government has been given notice of the suit," citing *Bank of Hemet v. United States*, 643 F.2d 661, 665 (9th Cir. 1981). App. A-3. *Hemet*, however, does not stand for this proposition.

In *Hemet*, the United States held an interest in title and possession to certain real property. The order of relevant facts are: On January 4, 1978, Hemet filed a quiet title action under § 2409a; on January 30, 1978, the property was sold; and on February 15, 1978, service was effected. The United States argued that "because it had sold the residence before the Bank of Hemet effected service, the waiver of sovereign immunity . . . is inapplicable." Hemet argued that § 2409a was met when the suit was filed, and that the failure to effectuate service was due to tardiness of the U.S. Marshall to serve the complaint and the United States' agent's refusal to accept service at the sale of the property.

After referring to the facts in the case and those related to service, the court stated that "we hold that under the circumstances of this case the presence of a waiver of sovereign immunity should be determined as of the date of the complaint was filed . . ." *Hemet*, 643 F.2d at 665. This general reference to the "facts of the case" is a far cry from requiring that notice be given to preserve jurisdiction, as asserted by the Court of Appeals. Indeed, the court went on to make clear that the controlling factor was the status when the suit was filed:

> Not only does this interpretation permit the Bank to have its day in court, it also restrains any tendency on the part of the government to manipulate its position subsequent to the filing of the complaint so as to present a situation that falls between the cracks of applicable waiver statutes.

> Therefore, because at the time the Bank filed suit the United States claimed title to the property, we find that 28 U.S.C. § 2409a waived the immunity of the United States to the Bank's quiet title action.

Hemet, 643 F.2d at 665.

This is no more than the application of the rule of the Ninth Circuit that "while a taxpayer may contest the procedural validity of a tax lien under § 2410, he may do so only if, at the time the action is commenced, the government still claims a lien or a mortgage on the property." *Hughes v. United States*, 953 F.2d 531, 538 (9th Cir. 1992). This rule is required by the clear language of the statute that "the United States may be named a party in any civil action or suit in any district court . . . to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a)(1).

Therefore, the Court of Appeals' determination that notice upon the United States has any relevance to the determination of its jurisdiction or this appeal is misplaced.

B. Lis pendens

The panel next states that the United States' sale of the property after filing of the suit "does not moot the action if a judgment in favor of the plaintiff still is enforceable against subsequent purchasers," citing *Goodwin*, 935 F.2d

at 1063-64. App. A-3. *Goodwin*, does not go this far.

In *Goodwin*, the United States sold Goodwin's real property after receiving a summary judgment from the district court and while Goodwin was on appeal. The United States argued that the sale of property mooted Goodwin's appeal. Goodwin countered that the filing of a lis pendens preserved his right to appeal. The court held that the filing of a lis pendens was sufficient to keep his appeal from becoming moot. Because Goodwin did not assert that his appeal had continuing vitality, per se, the court obviously did not resolve that question. Therefore, the case does not carry the weight the Court of Appeals placed on it.

The Goodwin court did concur, however, that:

> This action was correctly instituted under 28 U.S.C. § 2410(A)(1) to quiet title to the Gladstone property. We find "nothing in § 2410(a)(1) that permits the government to oust the court of jurisdiction validly invoked.

Goodwin, 935 F.2d at 1064 (citing *Kulawy*, 917 F.2d at 733-34).

In *Kulawy*, there was no lis pendens. There, Kulawy filed an action to quiet title in two automobiles on November 15, 1988, that were scheduled for sale two days later. Kulawy moved for preliminary injunction and the United States agreed to postpone the sale pending

resolution of the motion. The district court subsequently denied the motion at a hearing and the United States served Kulawy at that hearing with a new notice of sale for December 5, 1988. On the date of the sale, but prior to it, Kulawy filed a new motion asserting additional grounds for relief. The United States sold the automobiles that day and his motion was denied the next. In March 1989, the United States filed a motion for summary judgment "dismissing the complaint on the grounds that the district court lacked subject matter jurisdiction because, *inter alia*, (1) the action had been rendered moot by the sale of property, and (2) 28 U.S.C. § 2410 does not waive sovereign immunity to quiet-title actions where the United States no longer has any interest in the property." *Kulawy*, 917 F.2d at 732. The district court rejected the United States' jurisdictional arguments, but dismissed the complaint on the merits.

On appeal, the United States argued, *inter alia*, "that even if the court originally had jurisdiction, its jurisdiction was lost once the government sold the automobiles." *Kulawy*, 917 F.2d at 733. The totality of the decision on this issue follows.

> As noted by the Third Circuit, the language of the section is sufficiently broad to permit such procedural challenges by a taxpayer, and if a suit under § 2410(a)(1) were not available, "the taxpayer would have no available means of enforcing compliance with the procedures enacted for his benefit."

> [Court denial of irrelevant jurisdictional argument omitted.]
>
> We find no greater merit in the government's alternative contention that the district court should have dismissed for lack of jurisdiction once the sale had taken place. The government had a lien on the automobiles at the time the suit was commenced, and the court plainly had jurisdiction at the time. We see nothing in § 2410(a)(1) that permits the government to oust the court of jurisdiction validly invoked.
>
> In sum, we have considered all of the government's arguments on this appeal in support of its contention that the district court lacked subject matter jurisdiction, and found them to be without merit.

Kulawy, 917 F.2d at 733-34 (citations omitted).

Not only does *Goodwin* not stand for the proposition asserted by the Court of Appeals, but a case that it cites as authority, *Kulawy*, holds directly to the contrary. Therefore, the Court of Appeal's determination that the filing of a lis pendens has any relevance to the determination of its jurisdiction is misplaced.

C. Judgment against purchaser

Finally, the panel's decision fails to address the fact

that good faith on the part of the purchaser is immaterial because the property transfer was void ***ab initio***. As raised on appeal, in *Monet*, 1995 U.S. Dist. LEXIS 12862, at *8, the court summarily held that good faith on the part of the purchaser is no bar. In terms directly on point, the court stated:

> Good faith on the part of the buyer Saltz [the purchaser at the I.R.S.'s sale of the redeemed property] does not prevent plaintiff from obtaining relief [quieting title], since good faith cannot validate a void transaction. In fact, a good faith buyer is involved in nearly every contested tax sale, yet courts have set aside such sales when the IRS has acted improperly. [Cite omitted, other brackets in original.].

Monet, 1995 U.S. Dist. LEXIS 12862, at *8

The Central District of California has also held procedurally invalid sales to be void ***ab initio*** stating:

> An invalid deed does not confer any rights upon a bona fide purchaser for value. "An instrument that is void of [sic] ***initio*** is comparable to a blank piece of paper and so necessarily derives no validity from the mere fact that it is recorded. [Cite to Cal. authority omitted].

Martin, No. CV 92-3184 DT (Tx), Findings of Facts and Conclusions of Law at *4.

The general rule in Alaska is also that the doctrine of good faith purchaser for value without notice does not apply to a void sale. Rosenburg, 727 P.2d at 783. Therefore, as a matter of law, the action is not mooted by the void sale of the property.

The Court of Appeal's conclusion that it is irrelevant whether the United States received notice of the quiet title action where the sale of the property moots the action because nobody can file a lis pendens under Alaska law as to personalty is misplaced. Most states do not allow, if any do, the filing of lis pendens as to personalty; therefore, the practical effect of the panel's decision is that the IRS may stop any quiet title action related to personal property by selling it. This rationale renders nugatory all the provisions of the Internal Revenue Code concerning the seizure and sale of personal property as well as the provisions relating to the waiver of sovereign immunity as to personal property under § 2410. Such a Congressional intent would be incredible and the proposition is contrary to both Ninth Circuit and other Circuits' authorities.

II. The Court of Appeals Erred as a Matter of Law Because a Judgment in Favor of the Newtons Is Enforceable Against Subsequent Purchasers.

Failing the first argument, the Newtons' argue that as a matter of law subsequent purchasers at tax sales have sufficient constructive notice that any judgment rendered on remand here would be enforceable against them.

The Central District of California has held that the Internal Revenue Code gives sufficient constructive notice to all persons to the extent that nobody is a bone fide purchaser at a tax sale. The court stated that:

> the individual defendants argue that the Court wrongly decided that A. Zenali was not a [bona fide purchaser]. California law provides that "facts which should put a reasonable person on inquiry . . . may amount to constructive notice." [Cites omitted.]. In a similar case, the purchaser was found to have had notice of 26 U.S.C. § 6339(b)(2), requiring the IRS to substantially comply with the law before it can transfer property rights. Martin v. Rubel Enterprises, No. CV 92-3184 DT (Tx), Findings of Facts and Conclusions of Law at *4 (C.D. Cal. Dec. 30, 1994). A reasonable purchaser of property from an IRS tax sale has constructive notice that the IRS must substantially comply with the law in order to convey property.

Anderson v. Zenali, 1996 U.S. Dist. LEXIS 11059, at *3-4, 78 A.F.T.R.2d 5838 (C.D. Cal. July 3, 1996).

The law in Alaska is the same. A person put on inquiry notice is not a bona fide purchaser. *Rosenburg*, 727 P.2d at 784; *Methonen v. Stone*, 941 P.2d 1248, 1252 (Alaska 1997).

While *Anderson* speaks to constructive notice under § 6339(b)(2) as to real property, § 6339(a) gives constructive

notice as to personal property. 26 U.S.C. § 6339(a) ("In all cases of sale pursuant to section 6335 . . ."); *Margiotta v. District Director of IRS*, 214 F.2d 518, 521-22 (2nd Cir. 1954) (requiring return of property from purchaser because predecessor of § 6339(a) gave notice that procedural requirements for seizure must be complied with by IRS before sale would be valid).

Additionally, the Supreme Court of Alaska has cited the Utah Supreme Court for the proposition that:

> It is elemental, and settled beyond argument in this jurisdiction, that tax sale proceedings and statutes are ***strictissimi juris***. The sales are made exclusively under statutory authority. The seller is making a sale not coupled with an interest, and derives his authority solely from the statute, and it is derived from no rule or principle of common law. He can have no authority to sell except as he is made the agent of the law for that purpose, and, if the steps necessary to precede his action fail, he is not invested with the legal right to make the sale; if one step fails, they all fail. The rule, therefore, is that all the preliminary requirements of the statute, made conditions to the exercise of the right and power to sell, and designating the various proceedings which culminate in the sale, must have been strictly complied with.

Johnson v. Miller, 391 P.2d 437, 439 (Alaska 1964) (affirming quiet title back in owner when tax sale held

three days before statute allowed).

Because any subsequent purchaser has constructive notice, a judgment rendered in this case may be enforced against them. Therefore, the Court of Appeal's holding to the contrary is erroneous as a matter of law.

CONCLUSION

The law in the Court of Appeals below and other Circuits is crystal clear that jurisdiction is determined when the complaint is filed. Equally clear is that the case cannot be mooted by the unilateral conduct of the United States. There is simply no basis for allowing the remedies provided by Congress for violation of the procedures required by law for the seizure and sale of property to be mooted by the unilateral act of the United States.

Beyond that, under two separate theories, courts in the Ninth Circuit have forbidden such a result; either 1) holding the sale void ***ab initio*** and therefore the bona fide purchaser protection inapplicable, or 2) holding that the Internal Revenue Code constitutes constructive notice sufficient that the purchaser is not a bona fide purchaser.

Whether this Court strictly interprets the jurisdictional statute; determines unlawful sales by the IRS are void ***ab initio*** under either federal or Alaska law; or finds constructive notice in the Internal Revenue Code or under Alaska law, the Court of Appeals' decision should be reversed.

Respectfully submitted,

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APPENDIX A

FRANK D. NEWTON; MARILYN NEWTON, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.

No. 97-35514

UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

1997 U.S. App. LEXIS 33518

November 17, 1997 **, Submitted

** The panel unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34(a);

November 21, 1997, Filed

NOTICE: RULES OF THE NINTH CIRCUIT COURT OF APPEALS MAY LIMIT CITATION TO UNPUBLISHED OPINIONS. PLEASE REFER TO THE RULES OF THE UNITED STATES COURT OF APPEALS FOR THIS CIRCUIT.

SUBSEQUENT HISTORY: Reported in Table Case Format at: *1997 U.S. App. LEXIS 38968.*

PRIOR HISTORY: Appeal from the United States District Court for the District of Alaska. D.C. No. CV 96-295-JKS. James K. Singleton, Chief Judge, Presiding.

DISPOSITION: AFFIRMED.

COUNSEL: FRANK D. NEWTON, Plaintiff - Appellant, Pro se, Kenai. AK.; MARILYN NEWTON, Plaintiff - Appellant, Pro se, Kenai, AK; For UNITED STATES OF AMERICA, Defendant - Appellee: Teresa E. McLaughlin. Janet A. Bradley, Attorneys, DOJT - U.S. DEPARTMENT OF JUSTICE, Washington, DC.

JUDGES: Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

OPINION: MEMORANDUM *

* This disposition is not appropriate for publication and may not be cited to or by the courts of this circuit except as provided by 9th Cir. R. 36-3.

Frank D. Newton and Marilyn Newton appeal pro se from the district court's grant of summary judgment in favor of the United States in their action pursuant to 28 U.S.C. § 2410 to quiet title to personal property seized for nonpayment of taxes. The Newtons contend that the district court erred by concluding that when the government sold the property two days after they filed their complaint, the government's waiver of sovereign immunity from suit expired, and the action became moot. We have jurisdiction under 28 U.S.C. § 1291, and we affirm.

The government's waiver of sovereign immunity is as

follows: "the United States may be named a party in any civil action or suit in any district court . . . to quiet title to . . . real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. § 2410(a). If the government sells the property and no longer claims any mortgage or lien interest prior to the filing of the suit, then this waiver does not apply. *See Hansen v. United States,* 7 F.3d 137, 138 n.1 (9th Cir. 1993) (per curiam); *Hughes v. United States,* 953 F.2d 531, 538 (9th Cir. 1992). The government's sale of the property after the filing of the suit, however, does not extinguish its waiver of sovereign immunity if the government has been given notice of the suit, *see Bank of Hemet v. United States,* 643 F.2d 661, 665 (9th Cir. 1981) (sovereign immunity waived pursuant to 28 U.S.C. § 2409a when plaintiff filed lis pendens before sale of real property and gave notice of suit at time of sale, and Treasury agents conducting sale refused service), and does not moot the action if a judgment in favor of the plaintiff still is enforceable against subsequent purchasers, *see Goodwin v. United States,* 935 F.2d 1061, 1063-64 (9th Cir. 1991) (appeal in quiet title action not moot because even though government sold real property after district court's grant of summary judgment, plaintiff filed lis pendens prior to recording of quitclaim deed).

The Internal Revenue Service (IRS) seized Frank Newton's fishing quota certificates on July 23, 1996. The Newtons filed their complaint on August 13, 1996, and the IRS sold the certificates on August 15, 1996. The complaint was served on October 25, 1996. In response to

the government's motion for summary judgment, the Newtons submitted Marilyn Newton's declaration that on August 13, 1996, they sent the complaint to the IRS by certified mail, and on August 16, 1996, they received undated return receipts.

The Newtons contend that this evidence created a genuine issue of material fact as to whether the government received notice before the August 15 sale. *See Bank of Hemet,* 643 F.2d at 665. Regardless, this action is moot because the Newtons' inability to file a lis pendens against their personal property makes any judgment in their favor unenforceable against subsequent purchasers. *See Goodwin,* 935 F.2d at 1063; *see also* Alaska Stat. § 09.45.940 (lis pendens may be filed in action affecting real property). Accordingly, we affirm the district court's dismissal of this action for lack of jurisdiction.

AFFIRMED.

APPENDIX B

FRANK D. NEWTON and MARILYN NEWTON, Plaintiffs, vs. UNITED STATES OF AMERICA, Defendant.

Case No. A96-0295 CV (JKS)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

1997 U.S. Dist. LEXIS 5275; 79 A.F.T.R.2d (P-H) 2333

March 28, 1997, FILED

DISPOSITION: Motion for summary judgment at Docket No. 8 GRANTED. Motion to add a party at Docket No. 13 moot and DENIED.

COUNSEL: FRANK D. NEWTON, PLF-1.1, Pro Per.; MARILYN NEWTON, PLF-2.1, Pro Per.; UNITED STATES OF AMERICA, DEF-1.1, R. Branman, U.S. Department of Justice.

JUDGES: JAMES K. SINGLETON, JR., United States District Judge

OPINIONBY: JAMES K. SINGLETON, JR.

OPINION: ORDER

(Motion for Summary Judgment)

Frank and Marilyn Newton bring this action against the United States pursuant to 28 U.S.C. § 2410, seeking to quiet title to certain personal property (one individual fishing quota share or IFQ) which the government seized and sold for non-payment of taxes. The United States moved for summary judgment, arguing that the waiver of sovereign immunity in § 2410 lapses when the property in question is sold to a third party. Docket Nos. 8, 12. The motion is opposed. Docket No. 10. It appears that the parties' briefings adequately disclose their respective positions and oral argument would not be helpful. *See* D. AK. LR 7.1.; *see also United States v. Cheely,* 814 F. Supp. 1430, 1436 (D. Alaska 1992).

The Newtons rely upon cases which hold that if the taxpayer files a lis pendens prior to the sale and under state law such a notice prevents a purchaser at the sale from being a bona fide purchaser for value, then the subsequent sale will not moot the taxpayer's proceeding. *See, e.g., Goodwin v. United States,* 935 F.2d 1061 (9th Cir. 1991). No lis pendens was filed or could have been filed in this case because the property in question is personal property and not realty. n1 Therefore, the cases upon which the Newton's rely are inapposite. *See Hughes v. United States,* 953 F.2d 531, 537-39 (9th Cir. 1992). This Court's jurisdiction in an action against the United States depends upon a valid waiver of sovereign immunity. *See Federal Deposit Ins. Corp. v. Meyer,* 510 U.S. 471, 114 S. Ct. 996, 127 L. Ed. 2d 308 (1994). The United States has not waived its sovereign immunity in an action such as this.

n1 *See* Alaska Statute 09.45.940 (filing lis pendens in action affecting title or right of possession of real property).

IT IS THEREFORE ORDERED:

The motion for summary judgment at Docket No. 8 is GRANTED. The Clerk of Court shall enter judgment dismissing this action for lack of jurisdiction. The motion to add a party at Docket No. 13 is moot and is therefore DENIED.

Dated at Anchorage, Alaska, this 27 day of March, 1997.

JAMES K. SINGLETON, JR.

United States District Judge

APPENDIX C

FRANK D. NEWTON; MARILYN NEWTON, Plaintiffs-Appellants, v. UNITED STATES OF AMERICA, Defendant-Appellee.

No. 97-35514

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

March 16, 1998, Filed

ORDER

JUDGES: Before: HUG, Chief Judge, PREGERSON and BEEZER, Circuit Judges.

The panel has voted to deny appellant's petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

FILED
SEP 3 1998
OFFICE OF THE CLERK
SUPREME COURT

No. 97-1994

In the Supreme Court of the United States

OCTOBER TERM, 1997

FRANK D. NEWTON AND MARILYN NEWTON,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether a taxpayer's suit under 28 U.S.C. 2410 to quiet title to personal property seized by the Internal Revenue Service for the collection of taxes becomes moot when that property is sold by the government to a third party before the summons is served and before a notice of lis pendens is filed.

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In the Supreme Court of the United States

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FRANK D. NEWTON AND MARILYN NEWTON,
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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A4) is unpublished, but the decision is noted at 131 F.3d 147 (Table). The opinion of the district court (Pet. App. B1-B3) is unofficially reported at 79 A.F.T.R.2d (RIA) 97-2333.

JURISDICTION

The judgment of the court of appeals was entered on November 21, 1997 (Pet. App. A1). The petition for rehearing was denied on March 16, 1998 (*id.* at C1). The petition for a writ of certiorari was filed on June 10, 1998. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The Internal Revenue Service made assessments of federal income tax liabilities against petitioners for the years 1981, 1988, 1991, 1992 and 1993. After filing notices of federal tax lien, the Service seized personal property (fishing quota certificates) belonging to Mr. Newton to satisfy the unpaid tax liability. The property was seized on July 23, 1996. A public sale was scheduled to take place on August 15, 1996 (Pet. App. A3).

On August 13, 1996, petitioners filed this action in federal district court to quiet title to the fishing quota certificates. They contended that the government's seizure was improper because the Service had not complied with the provisions of 26 U.S.C. 6335 concerning notice of the seizure and sale (Doc. 1 at 4). They asserted that jurisdiction exists in this case under 28 U.S.C. 2410. That statute creates jurisdiction over a suit "to quiet title to * * * real or personal property on which the United States has or claims a mortgage or other lien." 28 U.S.C. 2410(a)(1).

Petitioners failed to issue a summons to either the United States Attorney or the Attorney General, and made no return of service pursuant to Fed. R. Civ. P. 4(i), until October 25, 1996 (Pet. App. A3). Petitioners assert that they mailed a copy of the complaint to an unspecified office of the Internal Revenue Service on the day the complaint was filed and that an undated return receipt was received by them on August 16, 1996 (*id.* at A4). On August 15, 1996, however, two days after the complaint was filed and before service was made on the United States, the fishing quota certificates were sold at the scheduled sale (*id.* at A3).

2. After receiving the summons and complaint, the United States moved for summary judgment. The government pointed out that petitioners had not sought a preliminary injunction or temporary restraining order to bar the sale and that the summons and complaint had not been served until after the sale occurred. The government further noted that the sale had been completed before notice of the suit was received by the officials responsible for conducting the sale (Doc. 12 at 5). Because the property had been sold before the complaint was served and before an injunction or notice of lis pendens was filed, the government contended that it lacked "a mortgage or other lien" interest in the property (28 U.S.C. 2410(a)(1)) as is required for quiet title jurisdiction to exist.

The district court granted the government's motion for summary judgment. The court explained that, when service is made after the property is sold, the courts have no jurisdiction under 28 U.S.C. 2410(a)(1) unless an injunction or notice of lis pendens was entered prior to the sale to prevent the "purchaser at the sale from being a bona fide purchaser for value" (Pet. App. B2).[1] The court explained that the decisions cited by petitioners involved injunctions or notices of lis pendens and were therefore "inapposite" (*ibid.*) to the case at hand. The court concluded that "[t]he United States has not

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[1] Because this case involves personal property, taxpayers did not file, and indeed could not have filed, a notice of lis pendens under applicable state law. See Alaska Statutes 09.45.940 (Michie 1996) (providing for lis pendens only in actions affecting title or right of possession of real property).

waived its sovereign immunity in an action such as this" (*ibid.*).[2]

3. The court of appeals affirmed (Pet. App. A1-A4). The court stated that "[t]he government's sale of the property after filing of the suit * * * does not extinguish its waiver of sovereign immunity if the government has been given notice of the suit, and does not moot the action if a judgment in favor of the plaintiff still is enforceable against subsequent purchasers" (Pet. App. A3 (citations omitted)). The court concluded, however, that the present action is "moot because [petitioners'] inability to file a lis pendens against their personal property makes any judgment in their favor unenforceable against subsequent purchasers" (*id.* at A4).

ARGUMENT

The decision of the court of appeals is correct and does not conflict with any decision of this Court or any other court of appeals. Further review is therefore not warranted.

1. Under 28 U.S.C. 2410(a)(1), "the United States may be named a party in any civil action or suit in any district court * * * to quiet title to * * * real or personal property on which the United States has or claims a mortgage or other lien." This statute is manifestly narrow in scope. The statute does not waive the government's immunity when the United States has or claims no interest in the property. The statute is also inapplicable if the government claims a title interest—rather than a mortgage or lien interest—in

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[2] In light of its disposition of the case, the court denied as moot (Pet. App. B3) petitioners' motion (Doc. 13) to join the purchaser as a party.

the property. *Farr* v. *United States*, 990 F.2d 451, 453 (9th Cir.), cert. denied, 510 U.S. 1023 (1993); *Hughes* v. *United States*, 953 F.2d 531, 538 (9th Cir. 1992). In the present case, the government seized and sold the personal property before the summons was served. At the time that this sale occurred, title to the property passed to the purchaser (26 U.S.C. 6338(a), 6339(a)); the United States thereafter possessed no interest in the transferred property. Instead, the government held the money proceeds of the sale, in which it claimed a title interest. 26 U.S.C. 6342(a). If those sale proceeds yielded an overpayment of the outstanding tax liability, the government is to credit or refund the excess to the taxpayer. 26 U.S.C. 6342(b). If such an overpayment existed and the government failed to refund or credit the excess, the taxpayer may pursue a timely refund suit under 28 U.S.C. 1346(a)(1). As the court explained in *Trustees of the Puritan Church* v. *United States*, 294 F.2d 734, 735 (D.C. Cir. 1961), however, the provisions of 28 U.S.C. 2410 are not applicable in that context, for that statute does not apply to actions in which a plaintiff seeks to recover property that the government has seized and already sold.

If a complaint was served on the government *before* the property was sold and an injunction or a notice of lis pendens was filed with respect to the property before it was transferred to a third party, however, courts have interpreted 28 U.S.C. 2410 to allow the quiet title action to proceed even after the property is sold. See *Goodwin* v. *United States*, 935 F.2d 1061, 1063 (9th Cir. 1991) (the government had been served with the complaint and had opposed the taxpayer's request for injunctive relief prior to the sale); *Kulawy* v. *United States*, 917 F.2d 729, 731 (2d Cir. 1990) (same); *Delta Sav. & Loan Ass'n, Inc.* v. *IRS*, 847 F.2d 248, 249 n.1

(5th Cir. 1988) (lis pendens filed prior to the sale); *Bank of Hemet* v. *United States*, 643 F.2d 661, 665 (9th Cir. 1981) (lis pendens filed prior to the sale and the government had refused service of the complaint).

The present case does not fall within those limited circumstances in which courts have recognized a continuing quiet title jurisdiction after a sale. The complaint in this case was served after the sale occurred. An injunction was neither sought nor obtained, and a notice of lis pendens was not filed prior to the date of the sale.[3] Petitioners thus failed to take effective steps to preserve the status quo. In these circumstances, the court of appeals properly concluded that a quiet title action could not proceed under 28 U.S.C. 2410 because any judgment in petitioners' favor would be "unenforceable against subsequent purchasers" of personal property at the sale (Pet. App. A4).

2. The courts below correctly held (Pet. App. A4, B2) that the decisions on which petitioners seek to rely are inapposite to the present case.

a. The court of appeals correctly distinguished its prior decision in *Bank of Hemet* v. *United States*, 643 F.2d 661 (1981). That case held only that the sale of the property after the filing of the suit "does not extinguish [the government's] waiver of sovereign immunity *if the government has been given notice* of the suit" (Pet. App. A3) (emphasis added). In *Bank of Hemet*, unlike the present case, a notice of lis pendens had been recorded that informed both the government and the purchaser of the existing title dispute. Moreover, in *Bank of Hemet*, the failure to effect service on the

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[3] Petitioners included a request for injunctive relief in their complaint, but they did not move for a preliminary injunction or a temporary restraining order prior to the sale.

United States prior to the sale was due to the delay of the United States Marshal, and the Treasury officials who conducted the sale had refused service of the complaint. 643 F.2d at 665.

b. Petitioners incorrectly assert (Pet. 11) that the existence of notice to the United States of the quiet title suit is irrelevant. In each of the appellate decisions that have held that quiet title jurisdiction existed after the property had been sold, the government received formal notice of the taxpayer's lawsuit prior to the sale of the property. *See, e.g., Goodwin* v. *United States*, 935 F.2d at 1063; *Kulawy* v. *United States*, 917 F.2d at 731; *Delta Sav. & Loan Ass'n, Inc.* v. *IRS*, 847 F.2d at 249 n.1; *Bank of Hemet* v. *United States*, 643 F.2d at 665.

Petitioner errs in contending (Pet. 8-9, 11-14) that the decision in this case conflicts with *Goodwin* v. *United States*, *supra*, and *Kulawy* v. *United States*, *supra*. In *Goodwin*, a notice of lis pendens had been recorded before the sale occurred. 935 F.2d at 1063. And, in *Kulawy*, unlike the present case, the government had been served with the complaint prior to the sale and the taxpayer had "promptly moved for a preliminary injunction against the sale." 917 F.2d at 731. The facts of those cases differ markedly from the present case.

Petitioners nonetheless assert (Pet. App. 14-16) that, even after the property has been bought by an innocent third-party purchaser, a quiet title suit could be allowed to proceed on the theory that the original sale was "void" rather than merely voidable. As the court of appeals concluded in this case (Pet. App. A4), however, the sale of property to a third party who has no notice of the quiet title dispute *is* effective to transfer title and

is not void. There is no conflict among the circuits to warrant review of that decision in this case. [4]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1998

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[4] Petitioners incorrectly rely (Pet. 17) on *Anderson v. Zenali*, 78 A.F.T.R.2d (RIA) 96-5838 (C.D. Cal. 1996), aff'd, 129 F.3d 124 (9th Cir. 1997) (Table). The court in *Zenali* emphasized that that quiet title suit involved real property and was commenced against the purchaser *before* the deed was recorded. 78 A.F.T.R.2d at 96-5840, 96-5842. It is the deed that conveys and transfers title to real property under 26 U.S.C. 6339(b)(2).

Taxpayers also err in relying (Pet. 18) on *Margiotta* v. *District Director of Internal Revenue*, 214 F.2d 518 (2d Cir. 1954). That case did not involve the quiet title jurisdiction of 28 U.S.C. 2410. Instead, it was a bankruptcy case in which the party who held the property by assignment from the purchaser "interposed no objection to the summary jurisdiction" and was therefore "deemed to have consented to such jurisdiction" under the relevant provisions of Title 11. 214 F.2d at 520.